Supreme Court, U.S.
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No. 95-595

# In the Supreme Court of the United States

OCTOBER TERM, 1995

HILLER SYSTEMS, INCORPORATED, ET AL., PETITIONERS

*v.*

ISABELLA SERVIS, ADMINISTRATRIX OF THE ESTATE OF PETER THOMAS HUMPHREY, AND THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioners were "agents" of the United States when they performed repairs on a public vessel and were therefore immune from negligence liability under the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 54 F.3d 203. The opinion of the district court (Pet. App. 16a-40a) is reported at 858 F. Supp. 590.

### JURISDICTION

The judgment of the court of appeals was entered on May 16, 1995, and a petition for rehearing was denied on July 18, 1995. The petition for a writ of certiorari was filed on October 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 5 of the Suits in Admiralty Act, 46 U.S.C. App. 745, as incorporated by Section 2 of the Public Vessels Act, 46 U.S.C. App. 782, governs negligence suits involving public vessels. It contains an exclusivity provision stating that if

> a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States * * * whose act or omission gave rise to the claim.

46 U.S.C. App. 745. Under that provision, if an alleged tortfeasor is an agent or employee of the United States, the injured party's sole remedy is an action against the United States in federal court. However, if the alleged tortfeasor is not an agent or employee of the United States, the injured party plaintiff may bring a common law action against the tortfeasor in state court under the "saving to suitors" clause of 28 U.S.C. 1333. See Pet. App. 9a.

2. This case arises from the death of a ship repairman, Thomas Humphrey, aboard a public vessel, the M/V CAPE DIAMOND. The CAPE DIAMOND was purchased by the United States as part of the Ready Reserve Force, a fleet of more than 90 vessels capable of transporting on short notice military cargo, fuel, equipment, munitions, and other supplies in support of military forces. The ship is operated for the United States Maritime Administration (MARAD) by Marine Transport Lines, Inc. (Marine Transport) pursuant to a Ship Manager Agreement. Under the agreement, Marine Transport is responsible for repair and maintenance of the ship, and

it is authorized to hire contractors to perform certain repairs. Pet. App. 5a-6a, 21a-22a.

Marine Transport, acting as agent for the United States, issued a contract (the Repair Contract) to the Norfolk Shipbuilding and Drydock Company (Norshipco) to make repairs to the ship's fire suppression system. Pet. App. 6a, 21a-23a. Norshipco subcontracted the work on the fire suppression system to Hiller Systems, Inc. (Hiller). *Id.* at 6a, 22a-23a, 24a. Hiller in turn claims to have hired Valcon Sales and Services, Inc. (Valcon) to conduct tests on valves from the fire suppression system. *Id.* at 6a-7a, 17a, 23a. Marine Transport, again acting as agent for the United States, issued a separate purchase order (the Purchase Order) directly to Hiller to test the fire suppression system. *Id.* at 7a, 24a. Thomas Humprhey died during that test. A sudden discharge of a large quantity of carbon dioxide asphyxiated both Humphrey and a Coast Guard inspector. *Id.* at 7a-8a, 24a.

3. Respondent Isabella Servis, administratrix of Humphrey's estate, brought a negligence suit in Virginia state court against Norshipco, Valcon, Hiller, and three Hiller employees, who are all petitioners herein. Norshipco removed the action to federal district court and filed a third-party complaint against the United States under Federal Rules of Civil Procedure 14(c). Petitioners then requested that they be dismissed from the action, contending that they were agents of the United States and therefore immune from suit under Section 5 of the Suits in Admiralty Act, 46 U.S.C. App. 745, as incorporated by Section 2 of the Public Vessels Act, 46 U.S.C. App. 782. Servis moved for a remand to state court, but the district court found that

petitioners were agents of the United States entitled to immunity and granted them summary judgment. The court reasoned that petitioners were undertaking projects on behalf of the United States and that they were subject to the United States' approval and ultimate control and direction. See Pet. App. 19a-21a, 38a-39a.

The court of appeals reversed the district court's ruling that petitioners were agents of the United States. Pet. App. 1a-15a. The court relied on "basic principles of agency law." *Id.* at 10a. It determined that petitioners had failed as a matter of law to establish that there was any agreement between the United States and petitioners to form an agency relationship. *Id.* at 10a-12a. It also concluded that an agency relationship did not exist because the United States did not have operational control over petitioners' work. *Id.* at 12a-14a.

**ARGUMENT**

1. The court of appeals correctly concluded that petitioners were not agents of the United States, but were instead independent contractors hired to do discrete repair jobs on the ship. To be an agent, one must be "employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control." *In re United States*, 367 F.2d 505, 509 (3d Cir. 1966), cert. denied, 386 U.S. 932 (1967); Restatement (Second) of Agency § 1(1) (1957). Petitioners do not qualify as agents under that test. They stand in sharp contrast to Marine Transport, which MARAD expressly retained under the Ship Manager Agreement to be the agent of the United States in the operation of the CAPE DIAMOND. See Pet. App. 5a-6a, 10a-12a.

Agency is a consensual relationship that requires the assent of both parties. There must be a clear "manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." *Terbovitz* v. *Fiscal Court of Adair County*, 825 F.2d 111, 116 (6th Cir. 1987); see also *Hill* v. *Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817, 824 (10th Cir. 1986) (agency relationship requires consent of both parties). Petitioners are unable to point to any provisions of the Repair Contract or the Purchase Order that established such mutual consent to establish an agency relationship. See Pet. App. 11a-12a. The absence of consent demonstrates that the United States and petitioners did not have an agency relationship. See Restatement (Second) of Agency § 15 and comments a and b.[1]

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[1] Petitioners also do not qualify as subagents of Marine Transport. Section 5(1) of the Restatement (Second) of Agency states:

> A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.

None of the petitioners who performed work under the Repair Contract were acting as subagents of Marine Transport. Marine Transport, acting as agent for the United States, issued the Repair Contract to Norshipco, but Marine Transport did not purport to appoint Norshipco (or Norshipco's subcontractors) as subagents. See Pet. App. 6a, 11a-12a, 22a. Similarly, Marine Transport issued a Purchase Order providing that Hiller would reactivate and test the fire suppression system. See *id.* at 7a. But that Purchase Order did not designate Hiller as agent of the United States or as a subagent of Marine Transport. Hiller merely agreed to perform certain tasks and accordingly was a non-agent,

As the court of appeals noted, if the United States and petitioners had an agency relationship under the Suits in Admiralty Act, then the United States would have retained operational control over petitioners' activities. Pet. App. 12a-13a. See *Trautman* v. *Buck Steber, Inc.*, 693 F.2d 440, 445 (5th Cir. 1982); see also *Smith* v. *United States*, 346 F.2d 449, 451-452 (4th Cir.), cert. denied, 382 U.S. 878 (1965); *In re United States*, 367 F.2d at 509. Neither the Repair Contract nor the Purchase Order provided that the United States would exercise operational control over petitioners' repair actions. The absence of such control provides a further indication that the United States and petitioners did not have an agency relationship. See Pet. App. 13a-14a; see generally Restatement (Second) of Agency § 14 N, comment (b).[2]

2. The present case turns on the application of established agency principles to agreements between the parties, and it does not present any conflict among the courts of appeals. Petitioners cite three federal district court decisions to support their proposition that they are agents, see Pet. 6-7, 10-11, 20, but those decisions involve distinctly different facts. In each case the subcontractors had entered into an agreement with a recognized agent of the United

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independent contractor. Restatement (Second) of Agency § 14 N, comment (b).

[2] Contrary to petitioners' suggestion (Pet. 7-9), the Suits in Admiralty Act was not intended to make the United States vicariously liable for the negligence of any contractor hired to do work on public ships. As the court of appeals recognized, such a result is untenable. Pet. App. 15a. The net effect would be to subject the United States to unlimited liability for the negligence of independent contractors, who would have no incentive to exercise reasonable care.

States to fulfill portions of the agent's operational responsibilities. See *Walters* v. *Tidewater Fleet, Inc.*, 847 F. Supp. 464, 465 (E.D. La. 1994) (Tidewater subsidiary had contract with United States' agent to operate public vessel); *Bowman* v. *Pan American World Services, Inc.*, 704 F. Supp. 695, 696-697 (E.D. La. 1989) (Pan Am contracted with the United States' agent to operate public vessel); *Saffrhan* v. *Buck Steber, Inc.*, 433 F. Supp. 129, 130 (E.D. La. 1977) (Buck Steber had contract with operator of public vessel to provide personnel to man vessel). None of the petitioners had a similar contract with the government's agent, Marine Transport.[3]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The court of appeals suggested (Pet. App. 14a) that Section 5 of the Suits in Admiralty Act uses the term "agent" to signify only ship's agents, like Marine Transport, that are retained to manage and operate a vessel for the United States. That interpretation has textual support (see Pet. App. 14a) and is consistent with the cases cited above. But there is no need to resolve the matter here, because petitioners were not agents of the United States under any reasonable meaning of that term.